

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDY NGUYEN,

Defendant-Appellant.

---

UNPUBLISHED

March 13, 2008

No. 274031

Wayne Circuit Court

LC No. 06-003167-01

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 12 ½ to 25 years' imprisonment for the assault with intent to murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

**I. FACTS**

In October 2005, defendant and his then wife, Nhung Le, stopped living with one another. Le went to work for Dung Hong, the owner of the Golden Nail Salon in Westland. She also lived with Hong and his wife, Ha Thi To, for a two-month period after moving out of the marital home. According to Le, defendant did not want her to work at the salon.

On January 7, 2006, defendant came to the salon with his brother. According to To, defendant told her that she had two weeks to fire Le, or else there would be consequences. The police were called and an officer then called defendant and told him that if he returned to the salon he would be arrested. Defendant responded by telling the officer that he would return to the salon. Later that day, defendant did go back to the salon and the police were again called to the scene. Defendant testified that he did not threaten anyone on January 7, 2006, and that he went to the salon to offer his wife money to move out of the state.

On February 25, 2006, defendant purchased a firearm.<sup>1</sup> Defendant took his newly purchased firearm to the Dearborn Heights Police Station on February 28, 2006, to get his safety certificate. After receiving the certificate, defendant went to the firing range. When defendant left the range, he put his gun in his pocket and had two clips of ammunition remaining.

While driving home, defendant decided to go to the Golden Nail Salon to once again offer Le money to leave the state. According to defendant, Le wanted to move out of Michigan. Defendant entered the front door of the salon and asked To where Hong was. Defendant claims that he asked for Hong so that he could ask Hong for permission to talk with Le. To informed defendant that Hong was in the salon's back room.

There is conflicting testimony about the events that occurred after defendant entered the salon's back room. According to Hong, he was sitting in the back room eating lunch, and when he looked up, defendant was standing near him and pointing a gun at him. Defendant then told Hong that he was going to kill him. Hong then heard a clicking noise, implying that defendant pulled the trigger on the gun and the gun misfired. Hong then tackled defendant as he was attempting to reload the weapon. Le similarly testified that she saw defendant pull out the firearm and then heard a clicking noise before Hong tackled him. The two men wrestled for the firearm and at least four shots were fired. Hong testified that he eventually wrestled the firearm away from defendant. At that time, defendant ran out the back door of the salon and Hong ran out the front door.

According to defendant, he entered the back room and had a conversation with Le, who was vacuuming at the time. During the conversation, defendant was standing with his back to Hong. Defendant told Le that Hong was using her and that she should leave the salon. Hong then struck defendant in the back of the head with a hard object. Hong tackled defendant and a struggle ensued. In an attempt to force Hong to retreat, defendant pulled his gun from his pocket. According to defendant, he brought the firearm into the salon because the lock on his car door was not working. Hong grabbed for the firearm and the two continued to wrestle over the gun for five minutes. Hong eventually gained control over the weapon. He then tried to shoot defendant but missed, striking the ceiling. Hong then fired a second shot at defendant, who ducked and avoided the bullet. Defendant then fled out the back of the salon, with Hong firing two more shots at him as he ran. According to defendant, he never fired the weapon at the salon.

While several witnesses saw the two men wrestling for the weapon, none of them saw which man fired the shots.

## II. INTERMITTENT USE OF TRANSLATOR

Defendant first contends that his rights to due process and confrontation were violated when numerous trial witnesses had difficulty understanding and answering questions in English and the trial court asked the witnesses to try to answer in English and only use the available translator when necessary. We disagree.

---

<sup>1</sup> According to defendant, who moved to the United States from Vietnam, when he arrived in America he wanted to exercise his freedom and learn how to use a firearm.

### A. Standard of Review

Generally, this Court reviews a trial court's decision to not utilize an interpreter for an abuse of discretion. *People v Warren*, 200 Mich App 586, 591; 504 NW2d 907 (1993). However, because defendant did not preserve the issue of whether the intermittent use of the interpreter violated his right to due process and confrontation, this Court reviews defendant's claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1990).

### B. Analysis

This Court has previously stated that when a defendant challenges a trial court's failure to utilize an interpreter, "[w]e will find an abuse of discretion only where it appears from the record that the witness was not understandable, comprehensible, or intelligible and that the absence of an interpreter deprived the defendant of some basic right." *Warren, supra* at 591-592. While the trial court certainly appears to have had a strong preference for the Vietnamese-speaking witnesses to testify without an interpreter where possible, the court clearly instructed each witness that if they were unable to proceed in English, they should indicate such to the trial court so that the interpreter could assist them. Based on a review of the record, each of the Vietnamese witnesses does appear to struggle with the English language at times. However, in each such instance, the interpreter would be used or the attorneys would re-word the questions in a simpler form. At no point were the witnesses unintelligible or incomprehensible. As a result, it cannot be said that the trial court abused its discretion in establishing a preference for unaided testimony. Therefore, defendant cannot establish a plain error that affected his substantial rights.<sup>2</sup>

## III. PROSECUTORIAL MISCONDUCT

Next, defendant argues that he was denied a fair and impartial trial because of various acts of prosecutorial misconduct. Again, we disagree.

### A. Standard of Review

When the alleged misconduct is not properly objected to, this Court reviews claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant.

---

<sup>2</sup> To support his argument, defendant refers this Court to *People v Cunningham*, 215 Mich App 652, 546 NW2d 715 (1996). However, *Cunningham* is factually distinguishable from this case. In *Cunningham*, the defendant was able to successfully argue deprivation of his constitutional right to confront witnesses against him because the interpreter failed to fulfill her basic function, which is to "translate the relevant statements and responses." *Id.* at 656. The interpreter tried to "clarify" questions put to the complainant, had untranslated conversations with complainant, and even attempted to directly respond to questions put to the complainant, based on her understanding of complainant's prior testimony. *Id.* at 655-656. No such result occurred here. There is no indication that the translator in this case deviated in any way from directly translating the answers given by witnesses.

*Carines, supra* at 763-764. No error requiring reversal will be found if a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

## B. Analysis

Defendant first asserts that he was denied a fair trial when the prosecutor said during his opening statement that the evidence would show that defendant had previously threatened the lives of Nhung Le, Ha Thi To, and Dung Hong and then failed to produce any such evidence. We disagree.

When faced with a claim of prosecutorial misconduct, this Court must ascertain whether a defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). MCR 6.414(C) mandates that before he presents evidence, a prosecutor make a full statement of his case and the facts he intends to prove. This Court has stated that where a prosecutor indicates during his opening statement that he intends to prove a particular fact and then fails to do so at trial, reversal is not warranted unless the defendant can show bad faith or prejudice. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997).

The record indicates the prosecutor had a good faith belief that defendant threatened Le, To, and Hong and made repeated attempts during trial to elicit testimony regarding that threat. If the prosecutor had described the potential evidence in his opening statement in bad faith, it is doubtful that he would have continuously questioned the witnesses regarding the alleged threat and provided them numerous opportunities to inform the jury that no such threat was ever made. While the prosecutor was not able to establish that any threat was made on the lives of Hong, To and Le, defendant has failed to show his comment during his opening statement was made in bad faith.

Additionally, defendant cannot establish that he was prejudiced by the prosecutor's comments. Before the prosecutor's opening statement, the trial court explained to the jurors that they alone were the finders of fact and that the facts were to be determined by the evidence. The trial court continued and explained that the statements of the attorneys were not to be considered as evidence. At the close of trial and before deliberation, the trial court once again instructed the jurors that they should base their decision on the evidence and specifically stated that the opening statements were not part of the evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Even if it was improper for the prosecutor to indicate that he would establish that defendant had made threats to the lives of Hong, To, and Le on a prior occasion, defendant has not established that the statement denied him a fair trial because he has not shown that the trial court's instructions were insufficient to cure any alleged error.

We also reject defendant's argument that he was denied a fair trial when the prosecutor referred to him as an "evil aggressor" and to his "warped, evil sense of honor." Defendant cannot establish that the remarks denied him a fair trial. A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). While the prosecutor's classification of defendant as evil was indeed intemperate, it was not prejudicial. It appears that the prosecution secured defendant's conviction on the basis of the strong eyewitness testimony of Hong and Le. Defendant does not

establish that the result of the proceedings would have differed but for the comments of the prosecutor. Further, as stated above, the trial court instructed the jury on not considering the statements of the attorneys as evidence. Defendant has not demonstrated that the jurors disregarded the trial court's instructions.

#### IV. EXCLUSION OF EVIDENCE

Defendant next alleges that he was denied his rights to due process and confrontation when the trial court did not permit him to introduce evidence of Le's eligibility to work in the United States. We disagree.

##### A. Standard of Review

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

##### B. Analysis

Defendant argues that Le's work status was relevant to the alleged threat defendant made on January 7, 2006. Defendant's appeal is based on the false premise that the trial court excluded all testimony regarding the meaning of his statement on January 7, 2006, when he told To and Hong that there would be consequences if Le continued to work at Hong's salon. In reality, the trial court properly excluded two questions to To, each of which asked her to speak to the mindset or intention of Hong or defendant. Before that, the trial court allowed To to answer a question regarding Le's work status that did not call for speculation. To testified that she did not know Le's work status. There is no evidence that the trial court would have excluded questions to defendant, Hong, or Le regarding work status. Defense counsel's decision to not further pursue the issue of Le's work status with other witnesses may represent a strategic decision or may be the result of trial counsel's misunderstanding regarding the trial court's position on the issue. In either instance, it cannot be said that the trial court abused its discretion in excluding evidence of Le's work status when it was merely excluding questions that were asked in an improper form.

#### V. JURY INSTRUCTIONS

Finally, we reject defendant's contention that he was denied a fair trial when the trial court failed to provide the jury with proper instructions on self defense and unanimity.

##### A. Standard of Review

Generally, claims of instructional error are reviewed de novo. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). However, because defendant failed to object to the instructions, our review is for plain error affecting substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

## B. Analysis

Defendant first argues that he was denied a fair trial when the trial court failed to provide the jury with an instruction on self-defense. Before instructing the jury, the trial court asked the attorneys whether there were any needed instructions that were not considered by the court. The prosecution told the judge that it appeared a self-defense instruction was needed. The court then stated, “No. The claim isn’t self-defense as I hear. I haven’t heard self defense here.” Defense counsel responded, “It’s not being made.” Defense counsel thus affirmatively approved the exclusion of an instruction on self-defense. Where a defendant affirmatively approves of a trial court’s instructions he waives any objection to the instructions and extinguishes any resulting error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant next argues that the trial court erred in not providing the jury with a special instruction on unanimity. After the trial court instructed the jury, it asked the attorneys whether they had any objections to the instructions. Defense counsel then asked, “Your Honor, did you tell them about unanimous verdicts and things like that?” When the trial court responded it had and asked defense counsel whether he had heard the instruction, defense counsel responded, “I did.” Therefore, as with the issue of the self-defense instruction, because defendant affirmatively approved of the trial court’s instructions, he waived any objection to the instructions and extinguished any resulting error. *Carter*, *supra* at 215-216.

Affirmed.

/s/ William C. Whitbeck  
/s/ Donald S. Owens  
/s/ Bill Schuette